

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
Docket No. 2016-42-E

IN RE:

Power Purchase Agreement between Duke Energy Progress, LLC and Dillon Solar, LLC _____))))))	PROPOSED ORDER RULING ON REQUEST FOR CONFIDENTIALITY
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This matter comes before the Public Service Commission of South Carolina (“Commission”) upon the filing of an amendment to a Power Purchase Agreement (“PPA”) between Duke Energy Progress, LLC (“DEP” or the “Company”) and Dillon Solar, LLC (“Dillon Solar”) with the Commission (“October 5 Filing”). The amendment revised the PPA previously accepted for filing by the Commission in Order No. 2016-146 (“Amendment”). In the October 5 Filing, DEP submitted a request for confidential treatment due to the commercially sensitive and proprietary nature of certain portions of the Amendment. DEP included with the October 5 Filing a redacted version of the Amendment illustrating the portions for which confidentiality was sought.

On October 24, 2017, the Office of Regulatory Staff (“ORS”) filed a letter objecting to DEP’s confidentiality request, noting that certain headers, column labels, and definitions were redacted, and requested that the Commission deny the Company’s request unless and until the Company demonstrated why the redacted provisions are confidential. On December 1, 2017, DEP filed a revised Amendment with fewer redactions along with a memorandum supporting its request for confidential treatment. On December 5, 2017, ORS filed a letter maintaining its objection to DEP’s confidentiality

request. On December 8, 2017, the standing hearing officer issued a directive indicating that the Commission would rule on DEP's request for confidentiality in its December 20, 2017 business meeting and instructing the parties to file any further briefs by December 13, 2017. DEP filed a brief on December 13, 2017, and, on December 20, 2017, the Commission issued a directive requiring that the Amendment remain sealed and instructed Commission staff to schedule an oral argument as to the redacted documents. An oral argument was held on February 6, 2018.

For the reasons stated herein, we accept the Amendment to the PPA for filing and grant DEP's request to treat the Amendment as confidential.

FINDINGS AND CONCLUSIONS

1. Pursuant to S.C. Code Ann. Regs. 103-835 and 103-846 this Commission has made the South Carolina Rules of Civil Procedure and South Carolina Rules of Evidence applicable to discovery and evidentiary matters not otherwise addressed by Commission rules. The issue of sealing documents submitted to courts in South Carolina is addressed in Rule 41.1 SCRCp. Under Rule 41.1(a), a motion to protect information as confidential requires a balancing of public and private interests with consideration of a number of factors. In order to seal or protect information, the party requesting protection must show that, after weighing the various factors, the public interest favors sealing the documents or information.

2. Applying the analysis of Rule 41.1 to DEP's request for confidentiality, the Commission finds that the Amendment should be given protection from public disclosure because the redacted information is proprietary commercial information that enhances DEP's ability to negotiate contractual terms that are beneficial to ratepayers, and because the public interest would not be served by its disclosure.

3. The Amendment submitted for filing here amends a PPA that was granted confidential protection in Order No. 2016-146. That order protecting the confidentiality of the PPA is consistent with other rulings by the Commission in similar matters and is consistent with the policies of the Commission encouraging utilities to negotiate individual contracts with Qualifying Facilities (“QFs”) under the Public Utility Regulatory Policies Act of 1978 (“PURPA”). In Order No. 2007-70, issued in Docket No. 1980-251-E, the Commission considered a request by Duke Energy Carolinas, LLC (“DEC”) for protection of certain avoided cost information required to be filed with the Commission to comply with FERC regulations promulgated pursuant to PURPA. In considering the issue, the Commission required DEC to submit additional support for its request. DEC filed an amended request arguing that the documents “...contain confidential information that is proprietary and commercially sensitive and if disclosed, could adversely affect the Company’s ability to enter into arms-length generation procurement transactions.” Order No. 2007-70, at p. 2, citing Duke Energy Carolinas, LLC’s Amended Motion for Confidential Treatment filed Jan. 17, 2007. Based on the DEC showing, the Commission ruled that the information could be protected:

A review of the material in question in the Company’s 2006 Section 292.302 avoided cost information filing establishes that the material does provide detailed information concerning Duke Energy Carolinas’ business and practices which are sensitive. The South Carolina Freedom of Information Act (“FOIA”) allows exemption from disclosure proprietary business information that meets a definition of “trade secrets.” S.C. Code Ann. Section 30-4-40(a)(1) states that matters which may be exempt from FOIA include: “(1) Trade secrets, which are defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes.... Trade secrets also include, for those public bodies who market services or products in competition with others, feasibility, planning, and marketing studies, marine terminal service and nontariff agreements, and evaluations and other materials which contain references to potential customers, competitive information, or evaluation.” We find that the information contained in Attachment B to the Company’s 2006 Section 292.302 filing for which Duke Energy Carolinas seeks protection as confidential falls within the definition of materials which may be exempted from disclosure under FOIA.

Order No. 2007-70, at pp. 2-3.

4. The Commission's determination in Order No. 2007-70 is consistent with previous rulings in Docket No. 1980-251-E. In Order No. 1981-214, the initial order addressing PURPA implementation for South Carolina, the Commission determined that it was in the public interest for electrical utilities and QFs to negotiate contracts for the purchase of power pursuant to PURPA. Order No. 1981-214, at p. 6. The Commission also recognized that "[p]ursuant to these [negotiated] agreements, the affected electrical utility and qualifying facility may set rates, terms and conditions relating to purchases which differ from those which otherwise would be required by Section 210 of PURPA and the rules and regulations promulgated thereunder." *Id.* While recognizing and encouraging utilities and QFs to negotiate such agreements, the Commission also retained oversight of negotiated PURPA contracts by requiring that any such contracts be filed with the Commission. *Id.*, at p. 7. The Commission's practice of protecting the confidentiality of such contracts when they are filed enables the Commission to ensure the public interest through its oversight role while also enabling utilities to negotiate individualized terms of contracts with QFs.

5. By protecting the confidentiality of such contracts, the Commission has consistently recognized that the ability to negotiate different terms with different counterparties will be impacted by making such contracts available to anyone who asks for them. Making these contracts public would essentially result in making them non-negotiable – a result at odds with the Commission's expressed intent encouraging utilities and QFs to negotiate contracts. Moreover, such a result would be counter the Commission's determination that "electric utilities and qualifying facilities should not be overly restricted in the type of arrangements which they may negotiate" Order No. 1981-214, at p. 5.

6. The arguments made by DEP in favor of protecting the redacted information in the Amendment are very similar to the arguments considered by this Commission in Order No. 1991-272, issued in Docket No. 90-425-E. In that generic proceeding the Commission considered arguments by the Consumer Advocate that the Commission should end its practice of protecting from public disclosure contracts between electrical utilities and suppliers of coal and coal transportation services. The electric utilities argued that making the coal and transportation contracts public would impair the electric utilities' ability to negotiate favorable terms and would thereby harm rate-payers by resulting in higher rates. Based on the record in that generic proceeding, we declined to deviate from our practice of protecting the confidentiality of coal and coal transportation contracts, and the South Carolina Supreme Court affirmed that decision in a related case:

Here, SCE&G alleged that its future negotiating position with coal producers and coal transports would be impaired if the contracts were made public. Thus, SCE&G met its burden of showing good cause by alleging a particularized harm. The Consumer Advocate also met his burden by alleging that the contracts were relevant and necessary to the Consumer Advocate's case. The Commission then properly weighed each parties' competing interest in the discovery materials and fashioned a remedy which protected SCE&G's confidential contracts from public disclosure while at the same time allowed the Consumer Advocate full access to the information he sought. The Consumer Advocate was prevented only from disseminating the information.

Hamm v. South Carolina Public Service Commission, 312 S.C. 238, 242, 439 S.E.2d 852 (1994).

7. As in the *Hamm* case we find that the information contained in the Amendment is proprietary trade secret information, and there is no substantial reason in this case to depart from our practice of exempting commercially sensitive information from disclosure. Furthermore, permitting public disclosure of the terms of this PPA would enhance the bargaining position of the counterparty's competitors to the detriment of DEP's ratepayers. The submission of the FOIA request by a competitor of Dillon Solar in this case, in an effort to obtain access to the Amendment's

commercially sensitive information, demonstrates that the terms of negotiated PPAs have commercial value to competitors and that competitors believe that access to those terms will enhance their negotiating position with DEP.¹ This dynamic, between a QF solar developer and its competitor, offers corroboration that the information in question is a commercially sensitive trade secret information and therefore that the information is entitled to protection. We find that protecting the commercially sensitive terms of the Amendment from competitors of the counterparty will permit the utility to negotiate more effectively with all QF solar developers for the most advantageous contract terms, which will, in turn, benefit DEP ratepayers.

8. The factors that must be considered in weighing a request to seal a document under Rule 41.1 SCRCRCP are the following:

- (1) the need to ensure a fair trial;
- (2) the need for witness cooperation;
- (3) the reliance of the parties upon expectations of confidentiality;
- (4) the public or professional significance of the lawsuit;
- (5) the perceived harm to the parties from disclosure;
- (6) why alternatives other than sealing the documents are not available to protect legitimate private interests as identified by this Rule; and
- (7) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

9. Applying the Rule 41.1 factors to the October 5 Filing demonstrates that the Amendment is entitled to protection. There is no basis for a finding that protection of the Amendment would have any adverse effect on a fair trial or witness cooperation. It is apparent

¹ At oral argument, counsel for the ORS acknowledged that the only request for the unredacted document came from a competitor of Dillon Solar and that, no interest from members of the general public had been expressed.

that DEP and other parties have relied on the information being protected given this Commission's long history of treating QF PPAs as confidential. There is no particular public or professional significance to the Amendment that weighs against protection. As discussed above, disclosure of the Amendment would negatively affect DEP's negotiating position, there is not an alternative way to protect the information, and the public interest would be served by its protection. Balancing these factors leads to the conclusion that the October 5 Filing should be granted, and the Amendment should be protected.

IT IS THEREFORE ORDERED THAT:

- (1) The uncontested Amendment is accepted for filing.
- (2) DEP's request for confidential treatment of the redacted portions of the Amendment is in the public interest and is hereby granted.

BY ORDER OF THE COMMISSION:

Swain E. Whitfield, Chairman

ATTEST:

Comer H. "Randy" Randall, Vice Chairman

(SEAL)

**BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2016-42-E**

In Re:


**Power Purchase Agreement
between Duke Energy Progress,
LLC and Dillon Solar, LLC**

CERTIFICATE OF SERVICE

This is to certify that I, Toni C. Hawkins, a paralegal with the law firm of Sowell, Gray, Robinson, Stepp & Laffitte, LLC, have this day caused to be served upon the person(s) named below the **proposed Order on behalf of Duke Energy Progress, LLC** in the foregoing matter by electronic mail and by placing a copy of same in the US Mail addressed as follows:

Jeffrey M. Nelson, Esquire
SC Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201
jnelson@regstaff.sc.gov

Dated at Columbia, South Carolina this 26th day of February, 2018.



Toni C. Hawkins